85-136

Office-Supreme Court, U.S.
FILED
JUN 26 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 19_____

No.

HUGH P. MULVEY, JR., Individually, and as Class Representative,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari

To The United States Court of Appeals

For The Third Circuit

and

Appendices

W. Timothy Barry, Esquire
BARRY, DATTILO & FASULO
303 Pitt Building
213 Smithfield Street
Pittsburgh, PA 15222
(412) 391-9804

Attorney for Petitioner
Hugh P. Mulvey, Jr.

QUESTION PRESENTED

Whether the Motion to Intervene, filed by Hugh P. Mulvey, Jr. ("Mulvey"), on behalf of himself and the class which he represents, is timely as a result of the continuing nature of the racial and sexual hiring quota which was established by the District Court's Preliminary Injunction of December 5, 1975, as a temporary measure, and as a result of the lack of representation of Mulvey, and his class, by other parties of record.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	17
Appendix A -- Opinion of the District Court for the Western District of Pennsylvania	1a
Appendix B -- Opinion of the Third Circuit Court of Appeals Denying Appeal	7a
Appendix C -- Memorandum Opinion and Order of August 18, 1977	15a
Appendix D -- Memorandum of March 23, 1977	22a
Appendix E -- Constitutional Provisions and Statutes Involved	24a
Appendix F --Certificate of Service	32a

TABLE OF AUTHORITIES

Cases

Page

Afro-American Patrolman's League v. Duck (6th Cir. 1974) 19a

Bumgarner v. Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969) 14a

Chance v. Board of Examiners 51 F.R.D. 1156 (S.D.N.Y. 1970) 19a

Delaware Valley Citizens' Counsel v. Pennsylvania, 674 F.2d 970, 974 (3d Cir. 1982) 13a

Equal Employment Opportunity Commission v. American Telephone and Telegraph, 506 F.2d 735 (3d. Cir. 1974) 20a

Firebird Society, Inc. v. New Haven Board of Commissioners, 66 F.R.D. 456 (D. Conn. 1975) 19a

Jones v. Caddo Parish School Board, 704 F.2d 206, 222 (5th Cir. 1983) . . . 14a

NAACP v. New York, 413 U.S. 345, 366 (1973) 12a

Pennsylvania v. Flaherty, 404 F.Supp. 1022 (W.D. Pa., 1975) 3, 5, 6, 7, 3a, 8a, 9a, 11a, 17a

Pennsylvania v. Flaherty, 477 F.Supp. 1263 (W.D. Pa., 1979) . . . 3a

Page

Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3d Cir.) cert. denied, 426 U.S. 921 (1976) 12a, 13a

Rios v. Enterprise Association Steamfitters Local, 520 F.2d 352 (2nd Cir. 1975) 19a

Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 833 (2d. Cir. 1963), cert. den. 376 U.S. 944 (1964) 20a

Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) 8, 15, 17a

Statutes

Thirteenth Amendment to the Constitution of the United States 3, 7, 8a, 24a

Fourteenth Amendment to the Constitution of the United States . . . 3, 7, 15, 8a, 25a

28 U.S.C. § 1254 2

42 U.S.C. § 1981 . . . . . 3, 7, 15, 8a, 15a, 27a

42 U.S.C. § 1983 . . . . . 3, 7, 15, 8a, 15a, 28a

42 U.S.C. § 2000 15

53 P.S. 602 . . . . . 22a

Page

Other Authorities

Fed. R. Civ. P. 24 . . . . . 4, 8, 11, 11a, 12a, 17a, 29a

14A Cyclopedia of Federal Procedure . . 18a

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COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Wr t of Certiorari

To The United States Court of Appeals

For the Third Circuit

Petitioner, Hugh P. Mulvey, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 29, 1985.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania is printed in Appendix A hereto. The Opinion of the United States Court of Appeals for the Third Circuit is printed in Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The full texts of the Constitutional Provisions, Statutes and Federal Rule of Civil Procedure involved in this case are printed in Appendix E hereto.

This case involves the issuance of a Preliminary Injunction by the District Court on December 5, 1975, which established a temporary racial and sexual hiring quota for police officers of the City of Pittsburgh Police Department. As part of its Opinion in support of the issuance of the Preliminary Injunction, the District Court determined that the hiring procedure for applicants involved:

> . . . a pattern and practice of racial and sexual discrimination, whether intentional or not, which violates 42 U.S.C. §§ 1981 and 1983 and the Thirteenth and Fourteenth Amendments to the Constitution of the United States (emphasis supplied).[1]

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1. The Preliminary Injunction of December 5, 1975, and the District Court's Opinion in support thereof were reported at Pennsylvania v. Flaherty, 404 F.Supp. 1022, 1030-31 (W.D. Pa., 1975).

Therefore, the validity of this Preliminary Injunction, which has been in effect for more than nine (9) years, involves the interpretation and application of the above-stated Statutes and Amendments to the Constitution of the United States.

However, the threshold question is the timeliness of Mulvey's Petition to Intervene, pursuant to Federal Rule of Civil Procedure 24. It is Mulvey's position that he should be permitted to intervene, on behalf of himself and the class which he represents, as a matter of right, pursuant to Federal Rule of Civil Procedure 24(a)(2). In the alternative, intervention should be permitted pursuant to Federal Rule of Civil Procedure 24(b)(2).

STATEMENT OF THE CASE

On December 5, 1975, the Honorable Gerald J. Weber, United States District Judge for the Western District of Pennsylvania, entered a Preliminary Injunction, which was supported by his Opinion and Findings. Said Preliminary Injunction of December 5, 1975, ordered the Original Defendants, including the City of Pittsburgh and the City of Pittsburgh Civil Service Commission, and their representatives and members, to maintain four (4) separate hiring lists for candidates for employment as Police Officers of the City of Pittsburgh. 404 F.Supp. at 1031.

Paragraph 7 of said Preliminary Injunction also ordered Defendants to develop " . . . a broad-based system of competitive qualifications of future applicants . . . ." 404 F.Supp. at 1031.

Paragraph 8 of said Preliminary Injunction states as follows:

> 8. This interim method of appointing Pittsburgh Police Officers shall remain in effect until disposition of plaintiffs' prayer for permanent injunctive relief or until further order of this court. 404 F.Supp. at 1031.

Judge Weber's Opinion and Findings in support of the Preliminary Injunction of December 5, 1975, included the following relevant findings and conclusions:

1. The City of Pittsburgh undertook an intensive campaign to encourage blacks and women to apply for a position as Police Officers. 404 F.Supp. at 1025.

2. By Stipulation of the parties, the Court found that the written test administered on April 21, 1975, was as good a test as any available to measure job-related areas of the entry-level position of Police Officer. 404 F.Supp. at 1026.

3. That strictly on the basis of statistical under-representation and disparity between the percentage of blacks and women on the force and their percentage in the total population and work force of the City of Pittsburgh, " . . . a prima facie case is established . . . " of racial discrimination. 404 F.Supp. at 1028.

4. That the burden shifted to the Defendants to justify their pre-hiring procedures to rebut a finding of discrimination. 404 F.Supp. at 1029.

5. "Despite the valiant efforts of the city to recruit blacks and women . . .", the practice of racial and sexual discrimination, whether intentional or not, violated 42 U.S.C. §§ 1981 and 1983 and the Thirteenth and Fourteenth Amendments to the United States Constitution. 404 F.Supp. at 1029-30.

On May 9, 1975, the Fraternal Order of Police, Fort Pitt Lodge No. 1, (F.O.P.) filed a Motion to Intervene as a Defendant. The District Court permitted intervention pursuant to Federal Rule of Civil Procedure 24(b).

No appeal was ever filed by any party to the issuance of the Preliminary Injunction of December 5, 1975. However, on or about August 15, 1977, the Fraternal Order of Police filed a Motion to Dissolve the Preliminary Injunction of December 5, 1975, due to the fact that the Trial Court never found any purposeful discriminatory intent on the part of any of the Defendants, either in the past or in the present, citing Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

On August 18, 1977, the District Court issued a Memorandum Opinion and Order denying the Motion to Dissolve filed by the Fraternal Order of Police. In so doing, the District Court modified its prior Order of June 17, 1975, which initially granted the Fraternal Order of Police leave to intervene, by limiting the further participation of the Fraternal Order of Police as a Defendant to:

> . . . all points related to seniority and promotion rights of its members or any other aspect of its relationship with the City of Pittsburgh governed by a collective bargaining agreement which may be affected by any further relief granted to the Plaintiffs.[2]

On or about March 23, 1978, the Plaintiff, Commonwealth of Pennsylvania, and the Defendant, City of Pittsburgh, filed a Motion to Clarify the Preliminary Injunction of December 5, 1975. On March 23, 1978, the

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2. The District Court's Memorandum Opinion and Order of August 18, 1977, is printed in Appendix C hereto.

District Court filed a Memorandum concerning said Motion to Clarify, which stated, inter alia:

> There never was an issue in this case that the [civil service] statute was discriminatorily applied and its continued application does not violate the order. . . .[3]

On or about August 22, 1984, (the docket entry reads April 22, 1984,) Hugh P. Mulvey, Jr., filed a Motion to Intervene and a Motion for Dissolution, Modification, or Clarification of Preliminary Injunction. The Motion to Intervene alleges, inter alia, that Hugh P. Mulvey, Jr., is a white male who has, since 1975, applied for a position as a Police Officer with the City of Pittsburgh, has taken all of the appropriate examinations, and has otherwise maintained his eligibility for a position as Police

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3. The District Court's Memorandum of March 23, 1978, is printed in Appendix D hereto.

Officer. Said Motion further maintains that as a result of the hiring quota imposed by the Preliminary Injunction of December 5, 1975, he has never been considered for an appointment to a position as a Police Officer.

The Motion to Intervene requested that Hugh P. Mulvey, Jr., be allowed to intervene, as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2), on behalf of himself and on behalf of the class of white males who are similarly situated, due to the fact that none of the existing parties have adequately represented the interests of Hugh P. Mulvey, Jr., or the class which he represents. In the alternative, the Motion to Intervene requested intervention as a matter of discretion, pursuant to Federal Rule of Civil Procedure 24(b)(2).

No responsive pleading of any nature was ever filed by any party to Mulvey's Motions.

On or about August 30, 1984, the District Court issued a Memorandum Order denying Mulvey's Motion to Intervene.

On or about September 26, 1984, Mulvey filed his Notice of Appeal concerning the District Court's Memorandum Order of August 30, 1984.

On or about March 29, 1985, United States Court of Appeals for the Third Circuit entered an Opinion affirming the District Court's denial of intervention.

REASONS FOR GRANTING THE WRIT

Whether the Motion to Intervene, filed by of Hugh P. Mulvey, Jr., on behalf of himself and the class which he represents, is timely as a result of the continuing nature of the racial and sexual hiring quota which was established by the District Court's Preliminary Injunction of December 5, 1975, as a temporary measure, and as a result of the lack of representation of Mulvey, and his class, by other parties of record.

Mulvey's Motion to Intervene generally seeks a review of the Preliminary Injunction of December 5, 1975. Both the District Court and the Third Circuit Court of Appeals have held that his Motion to Intervene is untimely.

Although Mulvey filed his Motion to Intervene more than eight and one-half (8½) years after the issuance of the Preliminary Injunction, it is apparent that his Motion to

Intervene is, nevertheless, timely, for the following reasons:

(1) the racial and sexual hiring quota is continuing in nature;

(2) the Preliminary Injunction is, by its own terms and as a matter of law, temporary in nature;

(3) there is a complete lack of representation of Mulvey, and the class that he represents, by other parties of record;

(4) the Pittsburgh Fraternal Order of Police was permitted to intervene, but said intervention has been limited to promotional issues only;

(5) there has been a lack of appellate review of the interim hiring quota (although there has been appellate review of the promotional issues); and

(6) there has been a lack of review or further consideration by the District Court on the merits of the injunction.

It is clear that the District Court, when it issued the Preliminary Injunction of December 5, 1975, relied upon a "statistical disparity" and expressly found that there was

not any purposeful discriminatory intent on the part of the original Defendants. In so doing, the District Court improperly relied upon the cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq.

This Honorable Court has held, with respect to cases decided under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the Constitution of the United States, that there must be a finding of purposeful discriminatory intent in order to warrant judicial relief. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

The Fraternal Order of Police was originally permitted to intervene. However, when the F.O.P. attempted to challenge the hiring quota on the basis of Washington v. Davis, supra, the District

Court then limited the scope of the F.O.P.'s intervention to promotional issues.

Therefore, it is clear that none of the existing parties have or will seek review or further proceedings concerning the Preliminary Injunction. Unless Mulvey is permitted to intervene, the Preliminary Injunction will remain in effect without further proceedings or review.

As a secondary issue, the District Court also held that Mulvey's Motion to Intervene did not specifically allege changes in fact and circumstances subsequent to the issuance of the Preliminary Injunction. However, it is clear that the facts and the law have changed over the last nine (9) years; and, in this regard, the District Court abused its discretion in dismissing the Motion to Intervene without allowing Mulvey the opportunity to more specifically amend his

Motion, if necessary, and without requiring any responsive pleading from the other parties.

CONCLUSION

For the reasons stated above, Mulvey respectfully requests that his Petition for a Writ of Certiorari be granted. If it is determined that his Motion to Intervene is untimely, it is apparent that the hiring quota will remain in effect indefinitely without further proceedings or review.

Respectfully submitted,

W. Timothy Barry, Esquire

BARRY, DATTILO & FASULO
303 Pitt Building
213 Smithfield Street
Pittsburgh, PA 15222
(412) 391-9804

Attorney for Petitioner,
Hugh P. Mulvey, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, GUARDIAN OF GREATER PITTSBURGH, INC., N.A.A.C.P., N.O.W., et al., Plaintiffs,	)	
vs.	)	Civil Action No. 75-162
PETER F. FLAHERTY, Mayor, etc., ROBERT E. COLVILLE, Superintendent, etc., STEPHEN A. GLICKMAN President of the City of Pittsburgh Civil Service Commission, ALBERT STATTI and EDWARD L. ENGLISH, Members of the Civil Service Commission, MELANIE J. SMITH, Secretary and Chief Examiner of Civil Service Commission, and CITY OF PITTSBURGH, etc. Defendants,	)	
and	)	
F.O.P., FOR PITT LODGE NO.1, Intervening Defendant.	)	

MEMORANDUM ORDER
ON MOTION TO INTERVENE

We have a motion to intervene in the above-captioned action by an individual who alleges that he is being denied appointment to the Pittsburgh Police Department, for which he would be eligible except for the

relief ordered in the above case by this court on December 5, 1975. He also moves for a class action determination with himself as a representative plaintiff for the class.

Along with the Motion to Intervene he presents a Motion for Dissolution, Modification or Clarification of the Preliminary Injunction entered in this case on December 5, 1975.

The only reason given in the proposed Motion for Dissolution, etc., is that the court designated the relief awarded as a temporary, interim measure. He recites that, as of the time of filing the instant Motion, he is unaware of any subsequent order with respect to the dissolution, modification, clarification or other disposition of the Preliminary Injunction of 1975.

A close reading of the opinion issued with the 1975 order, which is reported in

404 F.Supp. 1022 (W.D. Pa. 1975), will reveal that while the court recognized it as "interim" relief, it also recognized that the remedy would require a long period of time.

> We cannot, with the present number of vacancies to be filled, overcome the effect of past disproportion in short order, but we can make a beginning and, with the passage of time, hope to see this imbalance reduced as the older members of the force pass into retirement and the new appointees begin to fill the ranks.
>
> 404 F.Supp. at 1029.

Nothing in the present motion to intervene alleges that the disproportion which was the result of past discriminatory practice has ended.

Parallel to our order of December 5, 1975, was an order entered in this action on October 12, 1979, reported in 477 F. Supp. 1263 (W.D. Pa. 1979), which imposed a program of preferential affirmative promotions applicable to the ranks of sergeant and lieutenent in the Pittsburgh Department of

Police. Before the proceedings on that issue of the complaint the Fraternal Order of Police, Fort Pitt Lodge No. 1, were allowed to intervene as representatives of existing police officers who would be affected by any relief granted under the prayer of the Complaint on that issue, and they presented a case in opposition to the case of the plaintiff.

On January 18, 1984, the Fraternal Order of Police filed a motion to terminate the preferential affirmative promotions previously ordered. The motion was denied by our order of January 25, 1984 on the finding that the grounds for the motion were those same arguments which were considered at the time the original order was entered and rejected. This order was appealed.

On August 14, 1984, this appeal was argued and on August 21, 1984, the Court of Appeals affirmed the order of this court, without prejudice to presentation of a proper

petition alleging changed circumstances and/or law.

This case has a long history and has been previously reviewed on appeal. It has considered in its first phase appointment to the entry level positions on the Police Department for both minorities and women, then the issue of promotions within the department, and most recently the rights of women formerly appointed to the Department, including questions of rank and pay.

One of the requirements for intervention is timeliness. We feel that intervention in this 1975 action, after numerous hearings on the separate issues, including the issues now attempted to be raised, and after numerous appeals, is untimely. This is a proper ground for rejection.

Furthermore, the present motion does not raise any allegations of changes in circumstances or law which affect the basis of the original order, in fact or in law.

Nor does it advance any argument that was not thoroughly argued and considered before the entry of the original order.

The motion to Intervene is DENIED, and the proposed Motion to Dissolve is DISMISSED.

SO ORDERED this 30th day of August, 1984.

/s/ Gerald J. Weber

Gerald J. Weber
United States District Judge

cc: All counsel

Hugh P. Mulvey, Jr., Individually and as Class Representative, Intervenor,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 75-0162)
District Judge: Gerald J. Weber

Submitted Under Third Circuit Rule 12(6)
March 28, 1985
Before: ALDISERT, Chief Judge, SLOVITER, Circuit Judge,
and STAPLETON, District Judge*

(Filed Mar 29, 1985)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Circuit Judge.

Hugh P. Mulvey, Jr. appeals the district court's denial of his motion to intervene in an action challenging the hiring and promotion practices of the Pittsburgh Bureau of Police. This action was filed on

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* Hon. Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

February 6, 1975 by the Commonwealth of Pennsylvania together with the NAACP and other groups and individuals against the City of Pittsburgh and its officials alleging racial and sexual discrimination in police hiring and promotion in violation of, inter alia, 42 U.S.C. §§ 1981 and 1983 and the Thirteenth and Fourteenth Amendments of the Constitution. On December 5, 1975, the district court granted a preliminary injunction requiring, inter alia, that new Pittsburgh police officers be appointed in groups of four, including one white male, one white female, one black male and one black female, from the lists of qualified applicants who passed the 1975 written examinations. Pennsylvania v. Flaherty, 404 F. Supp. 1022, 1031 (W.D. Pa. 1975). Although denominated "interim" relief, the court stated,

> We cannot, with the present number of vacancies to be filled, overcome the effect of past disproportion in short order, but we can make a

> beginning and, with the passage of time, hope to see this imbalance reduced as the older members of the force pass into retirement and the new appointees begin to fill the ranks.

Id. at 1029.

During the intervening ten years, there have been various motions and applications by the parties addressed to the relief ordered. For example, in 1979, the City of Pittsburgh requested and was granted a temporary modification when one of the eligibility lists of candidates for police officers was exhausted. The Fraternal Order of Police, which was an existing intervenor, filed a motion in early 1984 to terminate preferential affirmative promotions previously ordered. The district court denied the motion, and this court affirmed without prejudice to presentation of a petition alleging changed circumstances and/or law.

Appendix B

On August 22, 1984, almost ten years after the original injunction, Mulvey filed his motion to intervene on behalf of a proposed class of white males who were eligible to become police officers and who would have been appointed but for the preliminary injunction. Mulvey sought to challenge the continued validity and necessity of the injunction. The district court held that the motion was untimely, noting that the case has a long history and that the issue Mulvey wants to raise was already raised and considered earlier in these lengthy proceedings. The district court noted that Mulvey's motion did not allege "changes in circumstances or law which affect the basis of the original order." The court also rejected Mulvey's argument that because the preliminary injunction was intended to be temporary, he should be allowed to intervene, pointing out that it had expressly recognized in its 1975 opinion

that the remedy would require a long period of time, 404 F. Supp. at 1029.

On appeal, Mulvey contends that he has a right to intervene under Fed. R. Civ. P. 24(a)(2), which provides that:

> Upon timely application anyone shall be permitted to intervene in an action . . . when an applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

He argues, in the alternative, that the district court abused its discretion in not permitting him to intervene under Fed. R. Civ. P. 24(b)(2). He further contends that the district court's summary denial of the motion was procedurally improper. Assuming that we will permit him to intervene, he requests, first, that we direct the district court to permit him to amend his motion, second, that we direct the district court to

hold a hearing on his class action allegations, and third, that further consideration of the case involve a three-judge district court panel. We do not rule on these additional requests since we hold that the district court did not abuse its discretion in finding Mulvey's motion untimely.

Whether a motion to intervene is by right or by permission, it must be "timely". Fed. R. Civ. P. 24. In NAACP v. New York, 413 U.S. 345, 366 (1973), the Supreme Court stated,

> Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Thus, our task is to consider whether the lower court abused its discretion. In Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3d Cir.), cert. denied, 426 U.S. 921 (1976), we specified three crucial considerations

that should be considered in this context: (1) how far the proceedings have progressed; (2) prejudice which resultant delay might cause to other parties; and (3) reasons for the delay. In connection with the first consideration, we have adopted a "presumption that a motion to intervene after entry of a decree should be denied except in extraordinary circumstances." Delaware Valley Citizens' Council v. Pennsylvania, 674 F.2d 970, 974 (3d Cir. 1982).

We focus here on the first and third consideration set forth in Rizzo. Mulvey has failed to articulate any "extraordinary circumstances". Nor has he set forth any convincing reason why, since he admittedly was an applicant for the Pittsburgh Police Department from 1975 to the present, he delayed his attempt to intervene in this action for more than nine years. Therefore, we can find no abuse of discretion in the district court's holding that Mulvey's motion was untimely.

Nor can we find an abuse of discretion in the court's failure to hold a hearing on the motion. While such a hearing may be desirable under certain circumstances, a facially untimely motion may be denied without one. See Jones v. Caddo Parish School Bd., 704 F.2d 206, 222 (5th Cir. 1983). We will affirm the district court's order denying intervention.[1]

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1. Moreover, we affirm the judgment of the district court for the additional reasons that the petition did not allege a change in circumstances either in law or in fact, nor did it support the conclusory allegation that Mulvey's interests were not adequately represented by the existing parties with any fact other than that the existing parties took no action concerning the preliminary injunction since December 5, 1975. A mere difference of opinion as to tactics does not constitute lack of adequate representation. See Bumgarner v. Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969).

TO THE CLERK:

Please file the foregoing opinion.

/s/ Dolores K. Sloviter
Circuit Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA et al.	)	
v.	)	C.A. No.75-162
PETER F. FLAHERTY, Mayor et al	)	
and	)	
FRATERNAL ORDER OF POLICE, FORT PITT LODGE NO. 1	)	

MEMORANDUM OPINION AND ORDER

The above-captioned action challenging the hiring and promotional policies of the Pittsburgh Bureau of Police as racially and sexually discriminatory was filed under 42 U.S.C. §1981 et seq. on February 6, 1975. In the initial stages of the case, this Court determined that the hiring issues would be resolved before other issues were considered because the City of Pittsburgh (hereinafter "City") intended to hire new recruits for the force as soon as possible. On May 8, 1975,

the Fraternal Order of Police, Fort Pitt Lodge No. 1 (hereinafter "the F.O.P.") moved to intervene as a defendant. In its motion the F.O.P. alleged that it had an interest

> "in seeing that most qualified individuals 'regardless of race or sex', are appointed to the Bureau of Police and that hiring be done in compliance with the Civil Service Laws and not on a 'preferencial [sic] basis'."

The F.O.P. further alleged that the City of Pittsburgh and other named defendants were not adequately protecting the interests of its members in the action. There being no objection by any party to the F.O.P.'s participation in the proceedings, this Court granted it under the rule allowing permissive intervention (F.R.C.P. 24(a)) on June 17, 1975.

On December 5, 1975, after a hearing, this court granted a preliminary injunction which required the City to hire from the list of applicants who had passed a written examination administered during the pendency

of the proceedings in accordance with a quota, 404 F. Supp. 1022. Finally, on August 15, 1977, the F.O.P. filed a "Motion to Dissolve Preliminary Injunction and Dismiss Suit." The basis of this motion is the allegation that the evidence offered in support of the preliminary injunction did not show and this court had not found discriminatory intent in the selection or administration of qualifying tests given applicants to the police force prior to the commencement of this suit. Such discriminatory intent, movant alleges, is required under Washington v. Davis, 426 U.S. 229 (1976).

The motion now before the court raises a problem other than the application of the Davis standard to the facts of this case. The court recognizes that a motion to modify or dissolve a preliminary injunction is proper despite the failure of a party to appeal the grant of the injunction, at least where

circumstances or the governing principles of law have changed in the interim. 14A Cyclopedia of Federal Procedure §73.79 (3d Ed. 1965.) However, we are troubled by the fact that the F.O.P., rather than the defendant directly affected by the outstanding preliminary injunction, has raised this point. Because we conclude that the F.O.P. has an interest in and, therefore, standing to raise only issues relating to its members' continuing employment relationship with the City, the original order allowing the F.O.P. to intervene must be modified and the pending motion denied.

As noted in the June 17, 1975, order, the F.O.P. had no right to intervene in this case under F.R.C.P. 24(a). Afro-American Patrolman's League v. Duck (6th Cir. 1974); Chance v. Board of Examiners 51 F.R.D. 1156 (S.D.N.Y. 1970). See also Rios v. Enterprise Association Steamfitters Local, 520 F.2d 352

(2d Cir. 1975); Firebird Society, Inc. v. New Haven Boa.d of Fire Commissioners, 66 F.R.D. 456 (D. Conn. 1975). Its alleged interest in the upholding of Pennsylvania's civil service statutes is no greater than that of any other group of concerned citizens. Nor does the F.O.P. (or its members) have any special interest in the selection process for new police officers. However, it appeared to the court in 1975, as it does now, that the F.O.P. has an interest in litigating issues of law and fact as to such aspects of the continuing employment relationship with the City as seniority and promotion rights. Equal Employment Opportunity Commission v. American Telephone and Telegraph 506 F.2d 735 (3d Cir. 1974). The court has the power to limit the role of an intervenor to issues related to those raised by the original parties, Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 833 (2d Cir.1963), cert. den.376 U.S. 944 (1964). The court

also has the power to limit a permissive intervenor's right to participate in an action to those matters in which it has an interest comparable to standing.

ORDER

And now this 18th day of August, 1977, IT IS ORDERED THAT this court's order of June 17, 1975, granting the Fraternal Order of Police, Fort Pitt Lodge No. 1 leave to intervene in the within action is MODIFIED. The F.O.P. may participate as a defendant on all points related to seniority and promotion rights of its members or any other aspect of its relationship with the City of Pittsburgh governed by a collective bargaining agreement which may be affected by any further relief granted to the Plaintiffs. The Motion to

Dissolve Injunction filed by the F.O.P. is hereby DENIED.

/s/ Gerald J. Weber
United States District Judge

cc: All counsel

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA et al Plaintiffs vs. PETER F. FLAHERTY, etc. et al Defendants and FRATERNAL ORDER OF POLICE, FORT PITT LODGE NO. 1, Intervening Defendant.	)	Civil Action No. 75-162

MEMORANDUM

A Motion to Clarify the Order of this Court dated December 5, 1975, has been filed. It requests clarification as to whether the provisions of 53 P.S. 602 of the Pennsylvania civil service statute is affected by our order. This statutory provision allows the appointing authority to select any one of the top three names on a certified eligibility list.

There never was an issue in this case that the statute was discriminatorily applied and its continued application does not

violate the order. The discretion to choose one of three names does not violate the provision requiring appointments in the order of standing. Any discriminatory effect of this procedure is eliminated by the order provisions of the order.

ORDERED filed this 23rd day of March, 1978.

/s/ Gerald J. Weber

Gerald J. Weber
United States District Judge

cc: Michael Louik, Esq.
Edward J. Abes, Esq.
Clencie L. Cotton, Esq.
Paulette Balogh, Esq. 3210 Alberta St. Apt. 6, Pgh. Pa. 15120
Samuel J. Vitaro, Esq.
Mead J. Mulvihill, City Solicitor
and Robert B. Smith, Asst. City Solicitor
Patricia G. Miller, Asst. Attorney General
Bryan Campbell, Esq.
Neighborhood Legal Services

Appendix D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 13

Section 1. Slavery Prohibited.

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section. 2. Power to enforce amendment.

Congress shall have power to enforce this article by appropriate legislation.[1]

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1. U.S. Constitution, Amendment 13, U.S.C.

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. Power to Enforce Amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[2]

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2. U.S. Constitution, Amendment 14, U.S.C. §§ 1 and 5.

42 UNITED STATES CODE

Section 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[3]

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3. 42 U.S.C. § 1981.

42 UNITED STATES CODE

Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[4]

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4. 42 U.S. § 1983, as amended December 29, 1979, P.L. 96-170, § 1.

FEDERAL RULE OF CIVIL PROCEDURE 24

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a

question or law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer of agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer of agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure

shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.[5]

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5. Fed. R. Civ. P. 24.

CERTIFICATE OF SERVICE

I, W. Timothy Barry, Esquire, a member of the Bar of the Supreme Court of the United States, hereby certify that, in accordance with Rule 33 (1) of the Rules of the Supreme Court of the United States, I have served forty (40) copies of the foregoing **Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**, as amended, by postage-paid, first class mail, the 22nd day of July, 1985, upon:

Alexander Stevas, Clerk
Supreme Court of the United States
Washington, D. C. 20543;

one (1) copy upon:

Sally Mrvos, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106;

and three (3) copies of the same were delivered to counsel of record for the Commonwealth of

Pennsylvania, as Respondent, in the above-captioned matter by hand on the 22nd day of July, 1985, at the following address:

Thomas F. Halloran, Esquire
Senior Deputy Attorney General
Community Advocate Section
564 Manor Building
Pittsburgh, PA 15219.

W. Timothy Barry, Esquire

BARRY, DATTILO & FASULO
303 Pitt Building
213 Smithfield Street
Pittsburgh, PA 15222

Attorney for Petitioner,
Hugh P. Mulvey, Jr.

Appendix F

Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-136

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

HUGH P. MULVEY, JR., Individually,
and as Class Representative,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LeROY S. ZIMMERMAN
Attorney General

Thomas F. Halloran
Deputy Attorney
General

Andrew S. Gordon
Senior Deputy
Attorney General

Allen C. Warshaw
Executive Deputy
Attorney General

Office of Attorney
General
15th Fl. Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

BEST AVAILABLE COPY

24 pp

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the discretionary district court decision denying a motion to intervene because the motion, filed almost ten years after relief was granted, was untimely, failed to allege a change in circumstances either in law or in fact and failed to allege facts to support the conclusory allegations that the movant's interests were not adequately represented.

PARTIES

Commonwealth of Pennsylvania and Guardians of Greater Pittsburgh, Inc.; National Association for the Advancement of Colored Pecple - Pittsburgh Branch; National Organization for Women - Southwestern Pennsylvania Council of Chapters; Donald Allen, Benjamin Ashe, Jerome Aziz, Richard Hurt, Adam Kinsel, Lynnwood Scott and Richard Stewart; J. Terese Doyle; Cheryl Edmonds, Rose Mitchum, Linda Robinson, Joanne Rowe, Deborah Smith and Gloria Vanda; Harvey Adams, Mack Henderson, Theodore Saulsbury and Charles Tarrant; Gladys Smith; Peter F. Flaherty; Robert J. Coll; Stephen A. Glickman; Albert Statti and Edward J. English; Melanie J. Smith; City of Pittsburgh; Fraternal Order of Police.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	-i-
PARTIES	-ii-
TABLE OF CONTENTS	-iii-
TABLE OF AUTHORITIES	-iv-
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
ARGUMENT	8
CONCLUSION	17

TABLE OF AUTHORITIES

Cases	Page
Acuff v. United Papermakers, 404 F.2d 69 (5th Cir.), cert. denied, 394 U.S. 987 (1968).....	16
Baumgarner v, Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969).....	15
Com. of Pa. v. Flaherty, 404 F.Supp. 1022 (W.D. Pa 1975)....	13
Commonwealth of Pa. v. Flaherty, 472 F.Supp. 1263 (W.D. Pa. 1977)...	11
Delaware Valley Citizens Council v. Commonwealth of Pennsylvani, 674 F.2d 970 (3d Cir.)., cert. denied, 458 U.S. 1125 (1982).....	14
Donovan v. United Steelworkers of America, AFL-CIO, 721 F.2d 126 (3d Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 3535 (1984).....	9
Garrity v, Gallen, 679 F.2d 452 (1st Cir. 1983).....	9
Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1983).....	9
Jones v. Caddo Parish School Board, 735 F.2d 9232 (5th Cir. 1984).....	9

Cases(cont.): Page

Michigan Association for Retarded Citizens v. Smith,.657 F.2d 102 (6th Cir. 1981)..... 9

NAACP v. New York, 413 U.S. 345 (1973)..... 8,10

Sanguine, Ltd. v. United States Department of Interior, 736 F.2d 1416 (10th Cir. 1984)..... 9

Trobovich v. Mineworkers, 404 U.S. 528 (1972)..... 13

United Airlines v. McDonald, 432 U.S. 385 (1977)..... 11

United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983)..... 9

Washington v. Davis, 426 U.S. 229 (1976)..... 11

STATUTES AND RULES:

42 U.S.C. § 1981..... 3

42 U.S.C. § 1983..... 3

28 U.S.C. § 1254(1)..... 2

Fed. Rules Civ. Pro. Rule 24, 28 U.S.C..... 8

U.S. Sup.Ct. Rule 17, 28 U.S.C..... 16

Cases(cont.): Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIII.....

U.S. Const. Amend. XIV.....

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OPINIONS BELOW

The memorandum opinion of the Court of Appeals and the memorandum order the District Court are not reported. Copies are attached to the petition for certiorari as appendices B and A respectively.

JURISDICTION

The final judgment of the court of appeals was entered on March 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner is a white male who has applied for a position as a Pittsburgh police officer continuously since 1975, taking appropriate examinations and maintaining his eligibility. On August 22, 1984, petitioner moved to intervene in a 1975 action that had challenged the hiring and promotion practices of the Pittsburgh Bureau of Police.

That action was filed in the United States District Court for the Western District of Pennsylvania by the Commonwealth of Pennsylvania, together with the NAACP and other groups and individuals, against the City of Pittsburgh and its officials. It alleged unlawful racial and sexual discrimination in police hiring and promotions.

By order of December 5, 1975, the District Court found that the Pittsburgh Bureau of Police hiring and promotion practices violated 42 U.S.C. §§ 1981 and 1983 and the Thirteenth and Fourteenth Amendments of the United States Constitution. No appeal was filed from that order.

By order of May 24, 1979, the district court granted the City of

Pittsburgh's motion for temporary modification of the preliminary injunction when one of the hiring lists was exhausted. This modification continued through December 1, 1979. The Fraternal Order of Police, which intervened as a defendant in 1975, filed a motion early in 1984 to terminate preferential affirmative promotions previously ordered. That motion was denied by the District Court and the Court of Appeals without prejudice to the intervenor's right to file a motion alleging changed circumstances.

By memorandum order of August 30, 1984, petitioner's motion to intervene was denied because the District Court found it was untimely, that it failed to allege changes in circumstances or law which affect the basis of the original

order, and because of petitioner's failure to advance any argument that had not been thoroughly presented and considered before the entry of the original order. The District Court also observed that when it granted the preliminary injunction in 1975, it recognized that, although it was only affording interim relief, the remedy would require a long period of time because of the small number of vacancies that occur in the Bureau of Police. The District Court also noted that the motion to intervene failed to allege that the disproportion, which was the result of the past discriminatory hiring practices, had ended.

Petitioner appealed denial of his motion to intervene to the Court of Appeals. The Court of Appeals held that

the District Court had not abused its discretion in finding petitioner's motion to intervene to be untimely. The Court of Appeals also agreed with the District Court that the motion should be denied, even if considered timely, because the petitioner had failed to allege a change in circumstances either in law or in fact and failed to support the conclusory allegation that his interests were not adequately represented by existing parties.[1]

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[1] The Court of Appeals also found no abuse of discretion in the District Court's decision not to hold a hearing on the motion to intervene because the motion was untimely on its face and could be denied without one. That issued is not pressed here.

Subsequently, Mulvey filed a petition for writ of certiorari and this Court requested a response to the petition.

ARGUMENT

Certiorari should not be granted to review a District Court decision which denied a motion to intervene because it was untimely, it failed to assert changes in circumstances in law or fact, or to show that the movant's interests were not adequately represented. The ruling was discretionary and properly affirmed by the Court of Appeals.

Federal Rule of Civil Procedure 24 establishes timeliness as a prerequisite for intervention. In NAACP v. New York, 413 U.S. 345, 365-366 (1973), this Court stated:

> Whether intervention be claimed of right or as permissive, it is at once apparent from the initial words of both Rule 24(a)

> and 24(b), that the application must be 'timely'. If it is untimely, intervention must be denied.

Rule 24 is silent as to what constitutes a timely application for intervention. It has, however, been uniformly held throughout the courts of appeals that the determination of timeliness is left to the informed discretion of the district court.[2]

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[2] E g., Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983); Donovan v. United Steelworkers of America, AFL-CIO, 721 F.2d 126 (3d Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 3535 (1984); Holsey v Armour & Co., 743 F.2d 199, 205 (4th Cir. 1983); Jones v. Caddo Parish School Board, 735 F.2d 923 (5th Cir. 1984); Michigan Association for Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981); Sanquine, Ltd. v. United States Department of Interior, 736 F.2d 1416, 1418 (10th Cir. 1984); United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983).

To determine whether or not a district court has abused its discretion with regard to denial of intervention because of untimeliness, this Court has adopted a "totality of circumstances" test. Under this test, this Court in NAACP v. New York, supra, reviewed a denial of a motion to intervene on the basis of four factors:

(1) the length of time the petitioner knew or should have known of the pendency of the suit;

(2) the promptness with which the petitioner acted once aware of the suit;

(3) unusual circumstances warranting intervention;

(4) unusual circumstances militating against intervention.

As the Court of Appeals observed, petitioner was an applicant for employment with the Pittsburgh Police Department from 1975 until he filed his motion to intervene nine years

later. Petitioner knew or should have been aware of his alleged interest from the time of his application to be a Pittsburgh police officer until this motion to intervene was filed nine years later. Similarly, petitioner waited nine years after becoming aware of the suit to file his motion.[3]

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[3] Petitioner alludes in his present petition to a change in the law as a factor warranting intervention, relying upon Washington v. Davis, 426 U.S. 229 (1976). Washington v. Davis was decided eight years before his attempted intervention. Petitioner has provided no justification for his failure to act promptly. In addition, on August 15, 1977, the Fraternal Order of Police, which had intervened as a defendant in 1975, filed a motion to dissolve the injunction on the basis of Washington v. Davis, supra. The motion was denied and no appeal was taken. See Com. of Pa. v. Flaherty, unreported opinion (W.D. Pa. 1977), attached to petition as appendix C. Neverthless, petitioner failed to act promptly in order to preserve an appeal. See United Airlines, re. v. McDonald, 432 U.S. 385, 395-396 (1977).

In his motion to intervene petitioner failed to assert any unusual circumstances that would warrant intervention, particularly with regard to a nine year delay. Further militating against intervention is the fact that the decree was entered in 1975 and the District Court contemplated that the interim relief would take time to implement. The District Court stated:

> We cannot, with the present number of vacancies to be filled, overcome the effect of past disproportion in short order, but we can make a beginning and, with the passage of time, hope to see this imbalance reduced as the older members of the force pass into retirement and the new appointees begin to fill the ranks.

Com. of Pa. v. Flaherty, 404 F.Supp. 1022, 1029 (W.D. Pa. 1975). There are no extraordinary circumstances present. Thus, under this Court's totality of circumstances test, the Court of Appeals properly affirmed the District Court's denial of intervention as untimely.

In addition to petitioner's motion to intervene being properly denied as untimely, denial of intervention of right is also proper because petitioner's interest is already adequately represented by the existing parties. Fed.R.Civ.P. 24(a)(2); see also Trbovich v. Mine Workers, 404 U.S. 528, 538 (1972). Representation by the existing parties is generally deemed adequate unless there is collusion between the representative parties and an opposing party, the representative parties interests are adverse to the

proposed intervenor, or the representative parties have not been diligent in pursuing litigation. Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania 674 F.2d 970, 973 (3rd Cir.), cert. denied, 458 U.S. 1125 (1982). Petitioner's motion to intervene failed to allege any basis upon which the District Court could have concluded that his interest was not adequately represented. Indeed, the only reference to adequate representation in the motion was a conclusory statement in paragraph 7 that intervenor's interest is not adequately represented by existing parties. There is no allegation of collusion, that existing parties represent an interest adverse to the proposed intervenor, or that there had been a lack of diligence in pursuing the litigation.

The City of Pittsburgh has continuously defended this action. In fact, the preliminary injunction was temporarily modified at the City's request from May 24, 1979 to December 1, 1979, and a portion of the relief ordered was clarified upon motion of the City of Pittsburgh in 1982. The Fraternal Order of Police, which intervened in 1975, filed a motion to dissolve the injunction in 1977 relying on Washington v. Davis, supra. This motion was denied and no appeal was taken. Although petitioner apparently disagreed with the decision not to appeal, a difference of opinion as to tactics does not constitute lack of adequate representation of interests. See Bumgarner v. Ute Indian Tribe, 417 F.2d 1305 (10th Cir. 1969). Further, a decision not to take an

appeal does not itself show inadequate representation of interests. Acuff v. United Papermakers, 404 F.2d 169 (5th Cir.), cert. denied 394 U.S. 987 (1968).

Rule 17 of the Rules of this Court sets forth the considerations governing review on certiorari. The question presented, as stated by petitioner, is whether or not the District Court and the Court of Appeals properly determined that the motion to intervene was untimely and that petitioner's interests were adequately represented by the existing parties. It is clear that this challenge to the discretion of the District Court fails to address any of the considerations set forth in Rule 17 and the petition should be denied.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

Thomas F. Halloran
Deputy Attorney General

Andrew S. Gordon
Senior Deputy Attorney General

Allen C. Warshaw
Executive Deputy Attorney General

Office of the Attorney General
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

October 11, 1985